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In the Supreme Court of the United States

OCTOBER TERM, 1984

IN RE
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION
CREDITORS' COMMITTEE,
PETITIONER,

v.

KOERVER & LERSCH,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

C. HALL SWAIM
JOHN D. SIGEL
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100
Counsel for Petitioner, Good Hope Chemical Corporation Creditors' Committee

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Question Presented For Review

Upon the rejection in a bankruptcy case of an executory contract payable with reference to a foreign currency, are the damages in United States dollars determined as of the date the bankruptcy case was filed, as apparently required by Section 63c of the United States Bankruptcy Act (11 U.S.C. § 103(c)), the statutory antecedent of Section 365(g)(1) of the United States Bankruptcy Code (11 U.S.C. § 365(g)(1), or as of the date on which the bankruptcy court approved the rejection of the contract?

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In the
Supreme Court of the United States

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IN RE
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION
CREDITORS' COMMITTEE,
PETITIONER,

v.

KOERVER & LERSCH,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Good Hope Chemical Corporation Creditors' Committee (the "Committee") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on November 7, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is attached hereto as Appendix pages A-1 through A-14. The memorandum and order of the United States District Court for the District of Massachusetts is attached hereto

as Appendix pages A-15 through A-22. The memorandum and order of the United States Bankruptcy Court for the District of Massachusetts is attached hereto as Appendix pages A-23 through A-34.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was rendered and entered on November 7, 1984. A petition for rehearing was denied by Order entered on December 14, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statute Involved

Bankruptcy Act of 1898 § 63c (11 U.S.C. § 103(c)).

> Debts Which May Be Proved
>
> c. Notwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition initiating a proceeding under this Act.

Statement of The Case

1. STATEMENT OF FACTS

Through a series of telexes in 1974, Good Hope Chemical Corporation ("Good Hope") contracted to purchase from Koerver & Lersch ("K&L"), a West German corporation, two heat exchangers for an ammonia plant in Ingleside, Texas. (A-2). K&L was to receive a fixed number of German marks for the heat exchangers payable in three installments commencing on October 12, 1974 (A-3, 23-24).[1] Good Hope never

[1] The Committee contested this finding of fact. *See* fn. 3, *infra*.

made any payments under the contract and, on October 31, 1975, filed a voluntary petition under Chapter XI of the Bankruptcy Act. (A-3). K&L subsequently resold the heat exchangers to Petroleo Mexicanos at a substantial discount. (A-4).

On May 9, 1980, Good Hope's Second Amended Plan of Reorganization (the "Plan") was confirmed by the Bankruptcy Court. (A-4). Article VII of the Plan provided that Good Hope rejected all of its executory contracts. (A-12).

On June 12, 1980, in accordance with a stipulation agreed to by Good Hope, K&L and the Committee, the Bankruptcy Court allowed K&L's claim in the United States dollar equivalent of DM 11,055,121 in damages for the rejection of the executory contract; the question of the proper exchange rate by which to convert the claim in marks to a judgment in dollars was left open for judicial resolution. (A-4).[2]

During the period between the commencement of Good Hope's Chapter XI proceeding and June 12, 1980, the exchange rate for the conversion of marks to dollars rose more than forty-five percent. (A-5).

2. PROCEEDINGS BELOW

On July 22, 1983, the Bankruptcy Court entered a Memorandum and Order (A-23) holding that, under the "judgment day" rule adopted by this Court in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926), the applicable exchange rate was that prevailing on June 12, 1980, the date on which the parties stipulated to the amount of K&L's claim in marks.

On August 2, 1983, the Committee filed its Notice of Appeal to the United States District Court for the District of Massachusetts.

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[2] Because the Plan was a "pot plan" offering a *pro rata* distrubution to Good Hope's creditors, Good Hope had no interest in the determination of K&L's claim; the Committee is a party to this action because the conversion rate applicable to K&L's claim affects the amounts payable to other creditors of Good Hope. (A-4).

In a Memorandum and Order filed on January 16, 1984 (A-15), the District Court affirmed the "judgment day" decision of the Bankruptcy Court but stated that, by its analysis, the "breach day" rule adopted by this Court in *Hicks* v. *Guinness*, 269 U.S. 71 (1925) was applicable. The District Court stated, however, that it was not free to adopt the "breach day" rule because of the decision of the United States Court of Appeals for the First Circuit in *Gutor International Ag* v. *Raymond Packer Co.*, 493 F.2d 938 (1st Cir. 1974). (A-21). The District Court stated, however, that if the breach day rule were applicable, Section 63c of the Bankruptcy Act would require that the date of the breach relate back to the commencement of Good Hope's Chapter XI proceeding. (A-12, 17). The Committee filed a Motion for Reconsideration or, in the Alternative, For a Hearing, which was denied on February 2, 1984.

On February 27, 1984, the Committee filed its Notice of Appeal to the Court of Appeals for the First Circuit.

In an Opinion filed on November 7, 1984, the Court of Appeals vacated the decision of the District Court. (A-1). The Court of Appeals distinguished its prior decision in *Gutor* and held that the *Hicks* "breach day" rule was applicable in determining the proper exchange rate. (A-9-12).[3] The Court of Appeals also found, however, that Section 63c of the Bankruptcy Act does not require a relation back of the breach to the commencement of Good Hope's Chapter XI proceeding and that the date of the breach was May 9, 1980, the date the contract was rejected under Good Hope's Plan. (A-12-14).

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[3] The Committee argued in the courts below that the "breach day" rule was applicable because, among other reasons, Good Hope's obligation under the contract was payable in the United States dollar equivalent of a fixed amount of German marks. The Court of Appeals reached its decision notwithstanding its finding that Good Hope's obligation was payable in German marks. (A-6). Accordingly, the Committee does not now challenge the Court of Appeal's finding on the medium of payment but reserves its right to raise the issue should K&L argue that the Court of Appeals erred in applying the "breach day" rule.

The Committee filed a Petition for Rehearing which was denied on December 14, 1984. (A-35).

Reasons for Granting the Writ

I. The Decision of the Court of Appeals for the First Circuit is in Conflict With the Prior Decision of the Court of Appeals for the Tenth Circuit and Results in a Nonuniform Application of Federal Bankruptcy Law.

The decision of the Court of Appeals for the First Circuit with respect to the "relation back" doctrine conflicts with the decision of the Tenth Circuit in *Workman* v. *Harrison*, 282 F.2d 693 (10th Cir. 1960). Unlike the Tenth Circuit, the First Circuit has limited the application of the doctrine to the determination of the priority of a creditor's claim and has refused to apply the doctrine to the determination of damages. (A-13-14).

The relation back doctrine has its statutory source in Section 63c of the Bankruptcy Act (11 U.S.C. § 103(c)) which was enacted in 1938.[4] The proposed wording of the section prior to enactment was: "[r]ejection of an executory contract as provided in this act shall constitute an anticipatory breach, in the case of an arrangement or plan, as of the date of rejection, otherwise as of the date of bankruptcy." 83 Cong. Rec. S8687 (daily ed. June 10, 1938); *see* 3A *Collier on Bankruptcy*

[4] The application of the relation back doctrine to determine both the amount and priority of a party's claim pre-dates the enactment of Section 63c. *See In re Portage Rubber Co.*, 296 F.289 (6th Cir. 1924), *cert. denied*, 266 U.S. 604 (1924)(damages for breach of contract measured not as of date of debtor's adjudication but as of date of petition); *First National Bank of North Bennington* v. *Surdam* (In re Marshall's Garage), 63 F.2d 759, 763 (2d Cir. 1933) (present value of contractual amounts to be paid in future to be determined as of date of petition "which sets the line of cleavage for provable debts").

§63.35 at 1956 n.4 (14th ed. 1975). This wording was rejected, however, because the Senate committee:

> deem[ed] it inadvisable to make a distinction in regard to the date of the breach, between a strict bankruptcy and a debtor relief proceeding. Therefore your committee has removed this distinction and has related the time of the breach to the date of the filing of the petition under the act.
>
> Senate Report No. 1916, 75th Cong., 1st Sess. (1938) at 6.

In *Workman*, the Tenth Circuit considered the damages payable to a party to an executory contract rejected in a bankruptcy proceeding. The party had entered into a contract with the debtor to develop a shopping center. The Tenth Circuit noted that the rejection of the contract constituted a breach of that contract and held that the damaged party's "claim is limited to the value of his contract at the date the petition in bankruptcy was filed resulting in [the debtor's] adjudication. 11 U.S.C.A. § 103." 282 F.2d at 699.[5]

In the instant case, the First Circuit has ignored the clear mandate of Section 63c and has rejected the application of the relation back doctrine adopted by the Tenth Circuit in *Workman* by limiting the application of the doctrine solely to the determination of the priority of a creditors' claim.

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[5] *See also* 3A *Collier on Bankruptcy*, *supra*, at 1774.1-1775 & n. 15 (citations omitted) (emphasis added):

> A particularly important instance of the filing date rule is its application in *computing damages* for anticipatory breach of a contract . . . . The importance of this rule is now enhanced by its statutory application to any rejection by the trustee of an executory contract . . . .

Nationwide uniformity in the application of federal bankruptcy law is a matter of great importance. This Court should act to resolve the conflict between the two Circuit Courts of Appeal created by the First Circuit's decision.

II. The Error of the Court of Appeals for the First Circuit is not Obviated by the Enactment of the United States Bankruptcy Code.

The error of the Court of Appeals for the First Circuit in failing to apply the relation back doctrine of Section 63c to the measurement of damages is not obviated by the enactment of the United States Bankruptcy Code (11 U.S.C. § 101 *et seq.*) because the relation back doctrine has been preserved in Sections 365(g)(1) and 502(g) of the Bankruptcy Code. Section 365(g)(1) provides that "the rejection of an executory contract ... constitutes a breach of such contract ..., if such contract ... has not been assumed under this section or under a plan ..., immediately before the date of the filing of the petition ..." Section 502(g) provides that "[a] claim arising from the rejection ... of an executory contract ... *shall be determined, and shall be allowed* ..., the same as if such claim had arisen before the date of the filing of the petition." 11 U.S.C. § 502(g) (emphasis added).[6]

In keeping with the clear language of the Bankruptcy Code, the bankruptcy courts have continued to apply the relation back doctrine. *See, e.g., In re Davis*, 27 Bankr. Rep. 898, 900 (B.Ct. S.D.N.Y. 1983) ("Under the Code, a rejection gives rise to a legal fiction that a breach of the contract occurred immediately prior to the filing of the petition. 11 U.S.C. § 365

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[6] *See NLRB* v. *Bildisco & Bildisco*, __ U.S. __, 104 S.Ct. 1188, 1198, 79 L.Ed. 2d 482, 498 (1984):

> The Bankruptcy Code specifies that the rejection of an executory contract which had not been assumed constitutes a breach of the contract which relates back to the date immediately preceding the filing of a petition in bankruptcy.

(g)(1). Thus a claim is allowable for those damages resulting from the breach and the court will determine the amount and the validity of the claim as of the date of the breach.").

The decision of the Court of Appeals diverges from the clear language of the statute and exerts its pernicious effect in cases under both the Bankruptcy Act and the Bankruptcy Code.

III. The Decision of the Court of Appeals for the First Circuit is in Conflict With This Court's *Bildisco* Decision.

The Court of Appeals' construction of Section 63c as solely a rule for determining the priority of claims is in conflict with this Court's decision in *NLRB* v. *Bildisco & Bildisco*, __ U.S. __, 104 S.Ct. 1188, 79 L.Ed. 2d 482 (1984). In *Bildisco*, this Court considered the proper standard for the rejection of an executory collective-bargaining agreement under the Bankruptcy Code and the obligation of a debtor to comply with the terms of the agreement during the pendency of the reorganization proceeding. On the latter issue, the Court stated that "the filing of a petition in bankruptcy means the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again." 104 S.Ct. at 1199, 79 L.Ed. 2d at 499. And while the NLRB argued that Section 365(g)(1) of the Bankruptcy Code (the statutory successor of Section 63c of the Bankruptcy Act) governed only priorities of payment, this Court stated that "the implications from the decided cases are that the relation back of contract rejection to the filing of a petition in bankruptcy involves more than just priority of claims." *Id.* Thus, if the debtor chooses to receive benefits under a contract for the commencement of the proceeding, it must pay for the reasonable value of those benefits; if it chooses to assume the contract, it assumes the contract *cum onere. Id.*

The decision of the Court of Appeal for the First Circuit conflicts with this Court's decision in *Bildisco* by holding that

even if the debtor receives no benefits from the contract after the commencement of the proceeding, and even if the contract is unenforceable against the debtor after the commencement of the proceeding, the debtor's breach of the contract is deemed to occur only when the procedural steps for rejecting the contract are completed. The Court of Appeals' decision effectively places the burdens of the contract during the pendency of the debtor's reorganization on the debtor, and its other creditors, whether the contract is rejected or assumed.

In construing Section 63c of the Bankruptcy Act to apply only to the priority of payment of claims, the Court of Appeals placed itself in clear conflict with this Court's decision in *Bildisco*.

IV. The Decision of the Court of Appeals for the First Circuit is Inconsistent With This Court's Decision in *Hicks*.

In *Hicks* v. *Guinness*, 269 U.S. 71 (1925), this Court held that when a party was entitled to payment in a foreign currency, upon a breach of the payor's obligation, the payee had a claim for dollars as of the date of the breach and the conversion rate prevailing on the date of the breach should apply. The Court of Appeals for the First Circuit relied on *Hicks* in determining that the exchange rate in effect on the date of Good Hope's breach of its contract with K&L was applicable. (A-12). But, by finding that the K&L contract was breached when, and only when, the Bankruptcy Court confirmed Good Hope's Plan, the Court of Appeals in the name of *Hicks* has reached a result wholly inconsistent with this Court's decision in *Hicks*.

Good Hope was in breach of its payment obligations under the K&L contract for more than one year prior to the commencement of the Good Hope Chapter XI proceeding. (A-3). Had there been no Chapter XI proceeding and had K&L pursued

a civil action against Chemical, *Hicks* would require the application of the exchange rate prevailing on the date of the breach.

The Court of Appeals has applied a new gloss on *Hicks*, apparently applicable only in bankruptcy proceedings, to the effect that notwithstanding the times for performance stated in the contract (and notwithstanding the provisions of Section 63c of the Bankruptcy Act), a contract is breached only upon the bankruptcy court's approval of its rejection. But the determination of K&L's claim as of any date after the commencement of Good Hope's Chapter XI proceeding reflects an attempt to compensate K&L for the delay in payment imposed by that proceeding. Such a concern, while understandable outside a bankruptcy proceeding, should be irrelevant where all of Good Hope's creditors suffered from the same delay. A consistent application of *Hicks* and Section 63c would require that the Court of Appeals find that the K&L contract was breached as of the commencement of Good Hope's Chapter XI proceeding. Instead, the Court of Appeals has reached an anomalous result which furthers neither the goals of *Hicks* nor of the bankruptcy reorganization process.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 7, 1984.

Dated: March 8, 1985

Respectfully submitted,

C. HALL SWAIM
JOHN D. SIGEL
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100
Counsel for Petitioner, Good Hope Chemical Corporation Creditors' Committee

United States Court of Appeals
For the First Circuit

No. 84-1208

IN RE
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR.

GOOD HOPE CHEMICAL CORPORATION
CREDITORS' COMMITTEE,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
STEWART,* *Associate Justice (Retired)*,
and BOWNES, *Circuit Judge*.

C. Hall Swaim, with whom *Hale and Dorr* was on brief, for appellant.
Cheryl A. LaFleur, with whom *Charles P. Normandin*, and *Ropes & Gray* were on brief, for appellee Koerver & Lersch.

NOVEMBER 7, 1984

* Of the Supreme Court of the United States, sitting by designation.

CAMPBELL, *Chief Judge.* In 1974, Good Hope Chemical Corporation ("Good Hope"), a Texas corporation and the Chapter XI debtor, contracted with Koerver & Lersch ("K&L"), a West German manufacturer of specially fabricated equipment, to construct two sets of heat exchangers for use in an ammonia plant Good Hope was to build in Ingleside, Texas. The contract was formed by a series of telexes between Good Hope's purchasing agent, M. W. Kellogg Co. ("Kellogg"), and K&L in West Germany. The first telex, from Kellogg to K&L, advised K&L to "enter good hope chemical purchase orders" and quoted a purchase price in dollars. K&L's reply telex, however, stated:

> we confirm to have booked your order for the supply of heat exchangers strictly in accordance with your telex...with the following exception: all prices in the purchase order to be in german marks as follows: [list of figures omitted]
>
> two plants have been ordered at a total price of 13.046.540,—german marks. If the purchase order is .... made out in dollars it will not be accepted...
>
> the dollar prices in your purchase order have been worked out at a rate of one german mark equal to 0,394 dollars and have been used for comparison reason only.

According to K&L, it was unwilling to enter into the contract unless it provided for payment of a fixed number of marks because K&L expected to, and did, incur all costs of the contract in German marks, and because K&L's offices were in Germany, it had no investments outside of Germany, and it was unwilling to shoulder the risk of foreign exchange fluctuations. Subsequent communications and purchase order modifications relected the understanding that K&L would receive a fixed number of German marks for the heat exchangers.

The parties arranged for Good Hope to pay K&L in three installments: 30 percent 90 days after placement of the order, 30 percent 180 days after placement of the order, and the balance on shipment of the exchangers to Good Hope, F.A.S., a German or Dutch port. Good Hope was to notify its bank of the amount of marks owed K&L. Good Hope's American bank would then arrange a date for exchange with K&L's German bank. On that date, Good Hope's bank would wire marks to the German bank, which would credit K&L's account with that number of marks. Good Hope's bank would debit Good Hope's account by the number of dollars needed to buy the marks. Thus, Good Hope would not know the actual dollar cost to it of the heat exchangers until it paid for them.

Good Hope never made any payments under the contract. On October 31, 1975, after K&L had substantially completed the exchangers but before it shipped them, Good Hope filed a voluntary petition for reorganization under Chapter XI of the Bankruptcy Act. K&L filed its proofs of claims[1] in December 1975.

The attempts at reorganization failed, and when it became clear that the partially completed ammonia plant and the equipment intended for use in the plant could not be sold as a package to a third party, the creditors' committee, which included K&L, moved that the creditors be relieved of their contracts with Good Hope so that they could take other steps to mitigate their damages. Good Hope opposed the motion and the United States Bankruptcy Court for the District of Massachusetts denied it on June 8, 1978 on the grounds that there was no showing that the contracts were burdensome to the estate and no showing that rejection would benefit the estate.

---

[1] K&L filed a separate proof of claim for each heat exchanger, but the claim finally allowed in German marks, DM 11,055,121, reflects the total amount due K&L, less the proceeds K&L realized from its resale of the equipment to Petroleos Mexicanos. *See infra.*

Some time later, K&L arranged to sell the equipment it had made for Good Hope to Petroleos Mexicanos ("Pemex") at a deep discount. Good Hope opposed the same and sought an injunction; the injunction was denied and the sale went through.

On June 12, 1980, in accordance with a stipulation agreed to by Good Hope, K&L, and the creditors' committee, the bankruptcy court allowed K&L's claim in the total amount of the United States dollar equivalent of DM 11,055,121 for damages for the rejected executory contract.[2] This figure represents the final contract price minus the net proceeds K&L realized from the resale to Pemex.

After a hearing on January 20, 1983, the bankruptcy judge rejected Good Hope's creditors' committee's[3] argument that the appropriate date for determining the exchange rate is the date of the contract breach, which it asserted to be October 31, 1975.[4] Instead, the court adopted K&L's suggestion that the exchange rate on the date of judgment—June 12, 1980[5]—should govern the computation of the judgment amount.

---

[2] The parties expressly left open the question of what day's exchange rate should apply for purposes of converting the claim in marks into a judgment in dollars.

[3] As the bankruptcy judge explained in his order on the exchange rate issue:

> Concerned with the exchange rate issue is the creditors' committee, rather than the debtor. This is because the plan of [Good Hope], confirmed on May 9, 1980, is a "pot plan" so that my decision affects the amount other creditors of [Good Hope] will receive and does not require [Good Hope] to supply additional money to fund the plan.

[4] October 31, 1975 was actually the date of the filing of the petition in bankruptcy. In the committee's view this was also the breach date, since under section 63(c) of the Bankruptcy Act, rejection of an executory contract operates as a breach of the contract and relates back to the date of the filing of the petition.

[5] June 12, 1980 was the date the court allowed K&L's claim. The bankruptcy court's allowance of a creditor's claim has the effect of a final judgment on the merits in a Chapter XI proceeding. *See, e.g., Walter E. Heller & Co.* v. *Cox*, 343 F. Supp. 519, 524 (S.D.N.Y. 1972), *aff'd*, 486 F.2d 1398 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973).

The consequence of choosing the exchange rate prevailing on the judgment date, as opposed to the breach date as declared by the committee, is a substantially larger dollar judgment.

Date	*Exchange Rate*	*Claim in Dollars*
October 31, 1975 (filing of petition, asserted breach date)	0.3913	$4,325,869
June 12, 1980 (allowance of claim, judgment date)	0.5679	$6,278,203

K&L will not, of course, receive the full amount of the debt owed it but will receive, like the other unsecured creditors, a dividend based upon K&L's fraction of the total unsecured debt owed by Good Hope. Thus, the lower the dollar amount of K&L's claim, the lower will be K&L's percentage of the unsecured debt relative to the other claimants. The lower K&L's percentage is, the higher the dividends of the other creditors will be. Thus, the creditors' committee has appealed from both the bankruptcy court's determination that the contract price was payable in German marks and the court's use of the exchange rate in effect on June 12, 1980. The United States District Court for the District of Massachusetts affirmed the exchange rate selected by the bankruptcy court. The creditors' committee now appeals to this court.

I.

The creditors' committee first argues that the contract's reference to marks served only to adjust the amount of dollars payable; dollars, they contend, were to be the medium of payment under the contract. The facts, however, indicate that the reverse is true.

Telex communications between the parties make it clear that K&L contracted to receive German marks as payment for the heat exchangers that it was constructing. The district court found,

> With respect to place and medium of payment in the case at bar, there is no doubt that Good Hope's obligation was to deliver marks to K&L in Germany. Good Hope argues that it contracted to pay K&L in dollars. That view of the matter just does not fit with the facts. It is true that Good Hope had to pay dollars to its bank to buy marks. However, K&L was to *receive* marks: payment was to be in marks. The telexes and all subsequent purchase order modifications fixed K&L's price in marks. Good Hope would not know its cost, nor would it have fulfilled its payment obligation to K&L, until K&L received marks in its German bank account. The contract between Good Hope and K&L clearly called for payment "in foreign currency in a foreign country." *Gutor [International AG* v. *Raymond Packer Co.*, 493 F.2d 938,] 943.

The record below amply supports the lower court's characterization. Of particular note is the counteroffer from K&L reading, "if the purchase order is made out in dollars, it will not be accepted. . . . the dollar prices shown in your purchase order have been worked out at a rate of one german mark equal to 0,394 dollars *and have been used for comparison reason only.*" (Emphasis supplied.) We disagree with the creditors' committee's contention that the bankruptcy court and the district court erred in finding that Good Hope was obligated to deliver marks to K&L.

II.

A harder question is what date determines the exchange rate for converting damages, computed in marks, into a dollar judgment. *See Frontera Transportation Co.* v. *Abaunza*, 271 F. 199 (5th Cir. 1921); Note, *Conversion Date of Foreign Money Obligation*, 65 Colum. L. Rev. 490 (1965) ("It is a settled principle of Anglo-American law that judgments for money damages must be rendered in the currency of the forum.") (footnote omitted).

The parties, as well as the bankruptcy court and the district court, agree that the question of what date's exchange rate controls turns on the interpretation of two Supreme Court cases, *Hicks* v. *Guinness*, 269 U.S. 71 (1925), and *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517 (1926).

In *Hicks*, a German firm owed a debt to an American company. Although the debt was to be paid in America, the obligation was stated in German marks. The Court, employing what became known as the breach day rule, held that the American company had a claim for dollars as of the date the contract was breached and thus the conversion rate prevailing on that date should apply:

> The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors "You are too late to perform what you promised, and we want the dollars to which we have a right by the law here in force.... The event has come to pass upon which your liability becomes absolute as fixed by law."...The loss for which the plaintiff is entitled to be indemnified is "the loss of what the contractor would have had if the contract had been performed," ...it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time.

Hicks, 269 U.S. at 80.

By contrast, the Court one year later in *Deutsche Bank* used what has been labelled the judgment day rule. In *Deutsche Bank*, a German bank refused to return marks on deposit when the American depositor demanded them. The money was held by the Alien Property Custodian after World War I

and the depositor sued in the United States under the Trading with the Enemy Act to recover his money. The Court held that the amount owed should be converted at the rate in effect on the date of judgment, stating:

> In this case, unlike *Hicks* v. *Guinness*, 269 U.S. 71, at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose.... A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.... We may assume that when the Bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law—but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things.... An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether the creditor or debtor profits by the change the law takes no acount of it.... Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off.

Deutsche Bank, 272 U.S. at 518-19 (citations omitted).

As the district court correctly noted, courts and commentators have drawn from *Hicks* and *Deutsche Bank* disparate formulas for determining when to apply the judgment or breach day rules. Two principal approaches have emerged. The first is a rather mechanical approach that focuses on the place of payment. It requires that the judgment day rule apply when the contractual obligation is payable in a foreign country in that country's currency, and that the breach day rule apply when the payment is to be made in the United States. The district court questioned this formula. It indicated that it would have rejected it were it not for this court's decision in *Gutor International AG* v. *Raymond Packer Co.*, 493 F.2d 938, 943 (1st Cir. 1974). But the court read *Gutor* as requiring it to follow the above rule. While we understand the court's quandary, we do not believe that *Gutor* mandates such an approach. In *Gutor* we merely acquiesced in a formulation advanced by one side without effective opposition from the other.[6] The issue was never litigated.

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[6] In *Gutor*, this court applied the judgment day rule to a Swiss seller's breach of contract recovery against an American buyer, even though the claim arose under Massachusetts law. The exchange rate issue, however, was not squarely presented due to the *Gutor* defendant's failure to raise, and submit proof on, this issue at the district court level. The language of the opinion makes clear that this court did not address the issue on the merits, but rather adopted the plaintiff's position by default:

> Gutor in its complaint requested recovery "in the amount of sFr. 161'625.00, or the equivalent therefor in United States dollars computed at the official exchange rate existing on the date of judgment. . . ." Packer [the defendant] did not contest the price and terms. If Packer believed that damages should be computed as of some date prior to the date of judgment, it should have made the point before or at the hearing on the motion for summary judgment. After judgment, if it wished to pursue the matter, Packer should have timely moved to alter or amend the judgment under Rule 59(e).
>
> Gutor relies on the rule that when a debt is payable in foreign currency in a foreign country the proper date of conversion is the judgment or payment date and not the date on which the obligation arose. . . . the record is consistent with Gutor's assertions and the court's ruling. To the extent Packer was without later opportunity to

Now that the issue is squarely before us, we agree with the district court that a second approach, while more complex, conforms better with the Court's language in *Hicks* and *Deutsche Bank* and the weight of authority. This approach looks to the jurisdiction in which the plaintiff's cause of action arose to determine which rule is applicable. The judgment day rule applies only when the obligation arises entirely under foreign law. If, however, at the time of breach the plaintiff has a cause of action arising in this country under American law, the breach day rule applies.

The second approach follows logically from the language of both *Hicks* and *Deutsche Bank*. Thus the Court said in *Hicks*,

> When the contract was broken by a failure to pay, the American firm had a claim *here*, not for the debt, but, at its option, for damages in dollars.

269 U.S. at 80 (emphasis added).

This language contrasts with that in *Deutsche Bank*, where the Court said,

> In this case, unlike *Hicks*..., at the date of the demand the German Bank owed no duty to the plaintiff *under our law*. It was not subject to our jurisdiction and the only liability it incurred by its failure to pay was that which German law might impose.... Here we are lending our Courts to enforce an obligation (as we should put it, to pay damages,) arising from German law alone and ought to enforce no greater obligation than exists by that law at the moment when the suit is brought.

272 U.S. at 518-20 (emphasis added).

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persuade the court that payment was to be in the United States, thus possibly giving rise to a different rule, the fault was its own. We affirm the district court's judgment on Gutor's claim.

Gutor, 493 F.2d at 943-44 (footnotes and citations omitted).

The weight of authority endorses our reading of *Hicks* and *Deutsche Bank*. *See, e.g.*, *Zimmerman* v. *Sutherland*, 274 U.S. 253, 256 (1927) ("the distinction between the *Deutsche Bank* case and *Hicks* v. *Guinness*, 269 U.S. 71, is not, as argued, that the plaintiff in *Hicks* v. *Guinness* was in the United States, but that, as the Court understood the facts, the debt was payable in New York and *subject to American law*, so that upon a breach of the contract *there arose a present liability in dollars.*") (emphasis added); *Jamaica Nutrition Holdings* v. *United Shipping Co.*, 643 F.2d 376, 380 (5th Cir. 1981); *Conte* v. *Flota Mercante Del Estado*, 277 F.2d 664, 670 (2d Cir. 1960) ("when an obligation is governed by foreign law, the conversion from the foreign currency into dollars is made at the rate of exchange prevailing at judgment"); *Reissner* v. *Rogers*, 276 F.2d 506, 510 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960); *The Gulfe* v. *The Trujillo*, 209 F.2d 386, 387 (2d Cir. 1954); *Paris* v. *Central Chiclera*, 193 F.2d 960, 963 (5th Cir. 1952) (Rives, J., dissenting); *Shaw, Savill, Albion & Co.* v. *The Fredericksburg*, 189 F.2d 952, 955 (2d Cir. 1951) ("This court has held that the so-called judgment-day rule applies to the unliquidated damages where the cause of action was of foreign origin."); *Restatement (Second) of Conflicts of Laws* § 144 (1971) (Time for Converting Foreign Currency Into Local Currency) ("When in a suit for the recovery of money damages the cause of action is governed by the local law of another state, the forum will convert the currency in which recovery would have been granted in the other state into local currency as of the date of the award"); Note, *Dollar Damages to Foreign Plaintiffs: Conversion and Revaluation of Foreign Currencies*, 61 Yale L.J. 758, 759 (1952) (federal courts "employ the breach data only for causes of action 'arising' in the United States. If the cause of action 'arises' elsewhere, they generally adopt the judgment-date, converting the foreign currency loss at the exchange rate of that day") (footnotes omitted); *cf. Cronel Watch, S.A.* v.

Peterson State Bank, 565 F. Supp. 259, 262 & n.3 (N.D. Ill. 1983) (applying mechanical variant of second approach: judgment day rule controls where foreign breach while breach day rule applies to a domestic breach); *B. V. Bureau Wijsmuller* v. *United States*, 487 F. Supp. 156, 177 (S.D.N.Y. 1979) (same); Note, *Fluctuating Rates of Exchange and the Conflict of Laws*, 40 Harv. L. Rev. 619 (1926-27) (application of judgment or breach day rules depends on place where breach occurred because that is where right of action is created).

In this case, the bankruptcy court and the parties were in agreement that Good Hope's cause of action arose under American law. The "choice of law" approach mandates, therefore, that the rate of exchange in effect on the breach date prevail.

III.

Our decision to apply the breach date does not, however, end the matter. Given Good Hope's bankruptcy, it is not obvious what date constitutes the date of breach. The district court believed that section 63(c), 11 U.S.C. § 103(c) (1976), required that the actual date of breach—assumed to be the date upon which the contract was rejected, May 9, 1980[7]—relates back to the date the petition was filed on October 31, 1975. K&L argues that the relation back rule's rationale in bankruptcy has no applicability in this context. It also asserts that any "fictional" breach of the contract on October 31, 1975, did not give rise to an obligation enforceable against Good Hope on that date, and thus October 31, 1975 cannot be the determinative date under *Hicks*. *See Hicks*, 269 U.S. at 80 (upon breach "[t]he event has come to pass upon which your liability becomes as fixed by law"). *See also Zimmerman*, 274 U.S. at 256 (upon breach, "there arose a present liability in

[7] The Act provides that a Plan of Arrangement may include "provisions for the rejection of any executory contract." Bankruptcy Act § 357(2), 11 U.S.C. § 757(2) (1976). Chemical's Plan provided that all executory contracts would be rejected as of confirmation on May 9, 1980.

dollars"). Assumedly, they are contending that the date upon which Good Hope's liability became definite was (and thus the breach date should be) the date the contract was actually and finally rejected, May 9, 1980.

We find merit in K&L's contention. The *Hicks* Court believed that the fixation of liability is important because the plaintiff's loss, its expectancy from the contract, "happens when the contract is broken . . . and the plaintiff's claim is for the amount of loss valued in money at that time." Here the breach was complete, and the compensable loss incurred, only when the contract was rejected on May 9, 1980, not before. In this case, the relation back rule would disrupt the *Hicks* Court's attempt to give the plaintiff his expectancy as of the date his loss became definite.[8] The relation back rule is necessary in bankruptcy because without it a Chapter XI debtor would be required to reject an executory contract immediately upon filing or have its obligation for damages upon rejection during the bankruptcy case treated as an adminis-

[8] The object of the breach day rule is to restore the plaintiff to the position he would have enjoyed had the contract not been breached. *See Hicks*, 269 U.S. at 80 ("The loss for which the plaintiff is entitled to be indemnified is 'the loss of what the contractor would have had if the contract had been performed' "); Note, *Conversion Date of Foreign Money Obligations*, 65 Colum. L. Rev. 490, 493 (1965). The breach day rule, however, may fail to fully compensate plaintiffs like K&L who would have retained the foreign currency, which appreciated in value relative to the dollar, had the agreement been performed. To put K&L as nearly as possible in the position it would have enjoyed had the contract not been breached, we would have to use the judgment day rate of exchange, a result not reconcilable with our reading of Supreme Court precedent.

We recognize that more flexibility in determining the "breach date" for the purpose of awarding full compensation in cases like this, *i.e.*, permitting a court to use the judgment day rate of exchange in order to give the plaintiff its full measure of expectancy damages, might be desirable. But we also believe that because this is a rule governing commercial transactions, the parties' interest in a clearly defined rule, which affords them some degree of certainty, should be weighted heavily. Thus, we believe that the "breach date" selected should indeed be the date at which the contract is broken and the loss incurred, rather than some other date that gives plaintiffs like K&L the fullest possible recovery.

trative expense entitled to priority under section 64(a)(1), 11 U.S.C. § 104(a)(1) (1976). This rationale for the operation of section 63(c) has no applicability to the conversion rate issue. We recognize that the creditors' committee petitioned in 1975 to have the K&L contracts rejected, and they argue that they should not be made to suffer because of subsequent currency fluctuations. But we think that K&L is entitled to the conversion rate in effect when the contract was actually broken.

We hold therefore that the actual breach date—the date upon which the contract was rejected, May 9, 1980—is controlling. The rate of conversion prevailing on that date should be applied to the damages estimation to yield the dollar judgment amount.

The judgment of the district court is vacated and the matter is remanded for revaluation of K&L's claim in accordance with the exchange rate in effect on May 9, 1980.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 83-0489-F

IN RE
GOOD HOPE CHEMICAL CORP.,
DEBTOR.

MEMORANDUM AND ORDER
JANUARY 16, 1984

FREEDMAN, D.J.

This matter is before me on appeal from a bankruptcy judge's determination as to what exchange rate applies to the bankruptcy court's allowance of DM 11,055,121 claim against the debtor's estate.

Facts:

The relevant facts are as follows:[1] In 1974, Koerver & Lersch

[1] I have adopted the bankruptcy court's findings of fact because I have concluded, from a review of the record, that they are not clearly erroneous. Bankruptcy Rule 810. The debtor's Creditors' Committee, citing *1616 Reminc Ltd. Partnership* v. *Atchison & Keller Co.*, 704 F.2d 1313 (4th Cir. 1983), urges me to reject this standard of review and to engage in independent fact-finding. *Reminc*, however, is distinguishable from the case at bar. In *Reminc*, the Court of Appeals held that a district court could not use the clearly erroneous standard of Rule 810 to review a bankruptcy court's disposition of a compulsory counterclaim for breach of contract because " 'a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States.' " *Id.* at 1318 (quoting *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2882 (1982) (Burger, C.J., dissenting)). In the case before me, however, the bankruptcy court's findings relate to the central bankruptcy adjudication itself, i.e., a stipulation between creditors and debtor as to a rejected executory contract. We are not here dealing with a compulsory counterclaim that is only peripherally related to the bankruptcy proceeding, but with a controversy and claim that arose directly from the bankruptcy itself. Therefore, I decline to follow *Reminc* in this case because it is distinguishable, and I adhere to Rule 810's clearly erroneous standard.

("K&L"), a German corporation, and Good Hope Chemical Corporation ("Good Hope"), the Chapter XI debtor, contracted for K&L to build two heat exchangers for an ammonia plant Good Hope was to build in Ingleside, Texas. An exchange of telexes between M. W. Kellogg Co. ("Kellogg"), Good Hope's purchasing agent, and K&L formed the contract. The first telex, from Kellogg to K&L, stated the price in United States dollars. K&L's return telex, however, insisted that all prices were to be in deutsche marks, and that any use of dollar figures was for comparison purposes only. Thus, the arrangement was that K&L would receive a certain number of marks for the heat exchangers. Subsequent purchase order modifications reflected this understanding.

As brought out in testimony before the bankruptcy judge, the arrangement was for Good Hope to pay through its bank to K&L's bank in Germany. Good Hope was to tell its bank how many marks it owed to K&L. The American bank would then correspond with the German bank and set a date for exchange. On this date, the American bank would wire marks to the German bank, which would credit K&L's account with that number of marks. The American bank would debit Good Hope's account for the number of dollars it took to buy the marks. Thus, Good Hope would not know the actual dollar cost of the heat exchangers until it paid for them. Payment was to be made in three steps: 30% 90 days after placement of the order, 30% 180 days after placement of the order and the balance on shipment F.O.B. North Sea Port.

Good Hope never made any payments. K&L suspended construction of the heat exchangers in July 1975, because of Good Hope's serious financial condition. Good Hope filed its Chapter XI petition on October 31, 1975. After some delay and disagreements, K&L succeeded in selling the heat exchangers to Petroleos Mexicanos. On June 12, 1980, K&L, Good Hope, and Good Hope's Creditors Committee stipulated that Good Hope owed K&L DM 11,055,121 as damages for

the rejected executory contract. The bankruptcy court allowed this claim on the same day, however, the parties left open the question of what day's exchange rate should apply for purposes of converting the claim in marks into a judgment in dollars. The bankruptcy judge, after a hearing on January 20, 1983, rejected Good Hope's argument that the appropriate date for the exchange rate is the date of contract breach—October 31, 1975[2]—and adopted K&L's argument that the exchange rate on the judgment day—June 12, 1980[3]—governs. The former date would make K&L's claim worth only $4,325,869.00 while the latter gives K&L a $6,278,203.00 judgment. Accordingly, the Creditor's Committee has appealed the bankruptcy judge's ruling.

Discussion

The problem in this case arises because an American court can render a judgment only in dollars. *Frontera Transportation Co.* v. *Abaunza*, 271 F. 199 (5th Cir. 1921). Thus, K&L's claim in marks must somehow be converted into dollars, and the question is what is the appropriate day for an exchange rate.

The resolution of this case turns on the interpretation of two United States Supreme Court cases, *Hicks* v. *Guinness*, 269 U.S. 71 (1925), and *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517 (1926). In *Hicks*, a German firm owed an American firm 1079.35 marks. The Court held that the applicable exchange rate was the one in effect on the day the contract was broken by the German firm's failure to pay:

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[2] Under Section 63(c) of the Bankruptcy Act, formerly codified at 11 U.S.C. § 103(c), rejection of an executory contract operates as a breach of the contract and relates back to the date of the filing of the petition.

[3] In a Chapter XI proceeding, the bankruptcy court's allowance of a creditor's claim has the effect of a final judgment on the merits. *Walter E. Heller & Co.* v. *Cox*, 343 F. Supp. 519, 524 (S.D.N.Y. 1972), *aff'd* 486 F.2d 1398 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973).

> The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors "You are too late to perform what you have promised, and we want the dollars to which we have a right by the law here in force. *Gould* v. *Banks*, 8 Wend. 562, 567. The event has come to pass upon which your liability becomes absolute as fixed by law."

Hicks, *supra*, at 80. The holding of this case has become known as the breach day rule.

In *Deutsche Bank*, a German bank refused to turn over marks on deposit when the depositor demanded them. After World War I, this money was in the hands of the Alien Property Custodian and the depositor sued in the United States under the Trading with the Enemy Act to recover his cash. The Court held that the applicable exchange rate was the one in effect on the day the trial court rendered its judgment:

> In this case, unlike *Hicks* v. *Guinness*, 269 U.S. 71, at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. . . . A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.
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> . . . .
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> . . . Here we are lending our Courts to enforce an obligation (as we should put it, to pay damages,) arising

> from German law alone and ought to enforce no greater obligation than exists by that law at the moment when the suit is brought.

Deutsche Bank, *supra* p. 4, at 518-20. This case has come to personify the judgment day rule.

In discussing these two cases, the bankruptcy judge stated:

> These two cases have been reconciled by interpreting them to stand for the proposition that the judgment day rule applies where the obligation is entirely of foreign origin, i.e., where the contract calls for payment of a foreign currency in a foreign country . . . while the breach day rule applies where payment is to be made in the United States. . . .

In re Good Hope Chemical Corp., No. 75-2742, Memorandum and Order at 8-9 (Bankr. D. Mass. July 22, 1983). This appears to be an accurate statement of the law. *See, e.g.*, *Zimmermann* v. *Sutherland*, 274 U.S. 253, 256 (1927) (the distinction between *Deutsche Bank* and *Hicks* is that in *Hicks* "the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars"); *Jamaica Nutrition Holdings, Ltd.* v. *United Shipping Co., Ltd.* 643 F.2d 376 (5th Cir. 1981); *In re Wyse*, 340 F.2d 719 (6th Cir. 1965); *Conte* v. *Flota Mercante Del Estado*, 277 F.2d 664 (2d Cir. 1960); *Reissner* v. *Rogers*, 276 F.2d 506 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960); *International Silk Guild, Inc.* v. *Rogers*, 262 F.2d 219 (D.C. Cir. 1958); *Paris* v. *Central Chiclera S. De R.L.*, 193 F.2d 960 (5th Cir. 1952); *Det Forenede Dampskibs Selskab* v. *Insurance Co. of North America*, 31 F.2d 658 (2d Cir. 1929). Most importantly for this Court's purposes, the First Circuit has approved the view that the judgment day rule applies "when a debt is payable in foreign currency in a foreign country." *Gutor International Ag* v. *Raymond Packer Co.*, 493 F.2d 938, 943 (1st Cir. 1974).

In reviewing *Deutsche Bank*, *Hicks*, and the above-cited precedent, I found that these authorities are subject to two possible interpretations. Under one approach, the judgment day rule applies only when the obligation arises entirely under foreign law. If, however, at the time of breach the plaintiff had a cause of action under American law, the breach day rule applies. This interpretation follows logically from the language of both *Deutsche Bank* and *Hicks*. In *Hicks*, Justice Holmes stated, "When the contract was broken by a failure to pay, the American firm had a claim *here*, not for the debt, but, at its option, for damages in dollars." *Hicks*, *supra* p. 4, at 80 (emphasis added). In *Deutsche Bank*, he stated, "In this case, unlike *Hicks* v. *Guinness*, 269 U.S. 71, at the date of the demand the German Bank owed no duty to the plaintiff *under our law.*" *Deutsche Bank*, *supra* p. 4, at 518-19 (emphasis added). This interpretation also formed the basis for the dissent in the Fifth Circuit's *Paris* case. *Paris*, *supra* p. 6, at 964 (Rives, J., dissenting). *See also* Note, *Conversion Date of Foreign Money Obligations*, 65 Col. L. Rev. 490, 491 (1965); Fraenkel, *Foreign Moneys in Domestic Courts*, 35 Col. L. Rev. 360, 385 (1935).

Under a second approach to the authorities, the judgment day rule rather mechanically applies when the contract calls for payment of foreign currency in a foreign country, without regard for which country's law gives plaintiff his cause of action. It is true in many cases where the contract calls for payment of foreign currency in a foreign country, the defendant's obligation will also arise solely under foreign law and the two approaches will both call for application of the judgment day rule. This was the situation in *Deutsche Bank*, where the contract was to pay over a deposit on demand. It was also the situation in *Reissner*, *supra* p. 6, in which the plaintiff was forced to sell his business at a low price because of his religion and then later sued for unjust enrichment under the German Civil Code.

However, in some cases the contract calls for payment of foreign currency in a foreign country *and* the obligation to pay exists under the laws of the United States or of both countries. This seems to be true in the case at bar. In such a situation, this Court would prefer to apply the breach day rule because, as this Court understands *Deutsche Bank* and *Hicks*, the major distinction between those two cases is not place of payment but rather place where obligation to pay arises. As I read the Supreme Court cases, if the defendant's obligation arises under United States law, the breach day rule should apply.

Yet, this Court is not free to adopt the breach day rule in this case because it is bound by the First Circuit decision in *Gutor International*, *supra* p. 6. In that case, Gutor, a Swiss corporation, sued Packer, a Massachusetts corporation, to recover the price of dictating machines. The Court of Appeals cited the Massachusetts provisions of the Uniform Commercial Code as giving rise to Packer's obligation to pay for the machines. Thus, Packer's obligation to pay for the machines arose under United States law. Yet, the Court of Appeals applied the judgment day rule to the conversion of Gutor's recovery:

> Gutor relies on the rule that when a debt is payable in foreign currency in a foreign country the proper date of conversion is the judgment or payment date and not the date on which the obligation arose. . . . The record is consistent with Gutor's assertions and the court's ruling. To the extent Packer was without later opportunity to persuade the court that payment was to be in the United States, *thus possibly giving rise to a different rule*, the fault was its own.

Gutor International, *supra* p. 6, at 943-44 (emphasis added).

Therefore, it would seem, in this Circuit at least, that the judgment day rule is to be applied when the contract calls for payment in foreign currency in a foreign country.

With respect to place and medium of payment in the case at bar, there is no doubt that Good Hope's obligation was to deliver marks to K&L in Germany. Good Hope argues that it contracted to pay K&L in dollars. That view of the matter just does not fit with the facts. It is true that Good Hope had to pay dollars to its bank to buy marks. However, K&L was to *receive* marks: payment was to be in marks. The telexes and all subsequent purchase order modifications fixed K&L's price in marks. Good Hope would not know its cost, nor would it have fulfilled its payment obligation to K&L, until K&L received marks in its German bank account. The contract between Good Hope and K&L clearly called for payment "in foreign currency." *Gutor*, *supra* p. 6, at 943.

I therefore conclude that the bankruptcy judge was correct in his application of the judgment day rule to the conversion of K&L's claim. The applicable exchange rate is that in effect on June 12, 1980. The Order of the bankruptcy judge is, accordingly, AFFIRMED.

It is So Ordered.

(s) FRANK H. FREEDMAN
United States District Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

No. 75-2742-G

IN RE
GOOD HOPE CHEMICAL CORP.,
DEBTOR.

IN PROCEEDINGS FOR AN ARRANGEMENT
UNDER CHAPTER XI

MEMORANDUM AND ORDER
RE: EXCHANGE RATE ISSUE

On June 12, 1980, Koerver & Lersch, a German corporation, Good Hope Chemical Corporation, a Chapter XI debtor, and the creditors' committee of Good Hope Chemical Corporation entered into a stipulation (approved by the Court) fixing the amount of Koerver & Lersch's claim in the United States dollar equivalent of 11,055,121 Deutsche marks. The stipulation expressly left open the question as to what date the amount of the claim should be converted into United States dollars. That question, which was briefed and argued by counsel on January 20, 1983, is addressed by this memorandum and order.

FACTS

Koerver & Lersch ("K&L") and Good Hope Chemical Corporation ("Chemical") contracted in 1974 for K&L to construct two sets of heat exchangers intended for use in an ammonia plant to be constructed by Chemical in Ingleside, Texas. The M. W. Kellogg Co., a division of Pullman Incorporated ("Kellogg"), acted as Chemical's purchasing agent. Through a series of telexes, the contract was formed. The first relevant telex was dated July 12, 1974 and was sent from Kellogg to K&L. The price of the heat exchangers was stated

in United States dollars. Two weeks later, on July 25, 1974, K&L sent a telex to Kellogg which stated "all prices in the purchase order to be in german marks as follows. . . . two plants have been ordered at a total price of 13.046.540,—german marks. [I]f the purchase order is made out in dollars, it will not be accepted. . . . [T]he dollar prices shown in your purchase order have been worked out at a rate of one german mark equal to 0,394 dollars and have been used for comparison reason only."

Chemical purchase orders dated October 3, 1974 list the price of each of the heat exchangers in United States dollars and provide further that: "[p]ayment will be made by Good Hope Chemical Company in U.S. Dollars equivalent to the following German Marks. . . ." and set forth the amounts in German marks.[1] Subsequent modifications to the purchase order by Chemical reflect price increases were to be paid "[i]n accordance with terms of original purchase order, payment is to be made in U.S. dollars equivalent to German marks indicated. U.S. dollar amount shown is based on rate of one German mark equal to 0.394 dollars as per original order." "U.S. dollar amount shown is approximate and for MWK (Kellogg) purposes only. . . ." Invoices sent from K&L to Chemical and dated October 17, 1974 and January 21, 1975, list the amount due K&L in German marks. Payment was to be made 30 percent 90 days after placement of the order, 30 percent 180 days after placement of the order and the balance of 40 percent on shipment FOB, North Sea Port.

[1] It appears the contract was formed on this date as the July 25, 1974 telex from K&L to Chemical was a counteroffer which required acceptance by Chemical, *see generally* 1 Corbin on Contracts (1963), which was accepted by the October 3, 1974 purchase order. Furthermore, the above-mentioned stipulation provides, "on or about October 3, 1974, Koerver & Lersch contracted with the M. W. Kellogg Company. . .". However, the October 3, 1974 purchase order states: "[t]his is a confirming order. Telex advice to proceed was given to your Mr. H. H. Dreyer on July 12, 1974." Additionally, the July 25, 1974 telex provides: "We. . . are proceeding with the execution of your order." Although I recognize that there is some confusion as to the date the contract was formed, I believe I can get my job done without deciding that issue.

Although the first two invoices were sent to Chemical,[2] no payment was ever made. At the hearing held on January 20, 1983, Hans Dreyer, the employee of K&L responsible for negotiating the contract with Chemical, testified that K&L was willing to accept payment only on United States dollars equivalent to a fixed number of German marks. That would enable K&L to pay its employees and suppliers the amount of money (i.e. German marks) it actually expended in constructing the heat exchangers. All employees and suppliers were paid in German marks. All of K&L's offices were in Germany. K&L had no investments outside of Germany. K&L was unwilling to shoulder the risk of foreign exchange fluctuations.

Payment was to be made by Chemical through its bank to a German bank. Chemical was to inform its bank of how many German marks it owed K&L. The American bank would then correspond with a German bank and set a date for exchange. On this date, the American bank would wire marks to the German bank, the German bank would credit K&L's account with that amount of German marks and Chemical's account in the American bank would be debited in an equivalent amount of United States dollars. Only on that date would Chemical learn the cost in United States dollars, of the heat exchangers, to that date.

Construction of the heat exchangers was suspended in July of 1975 due to the severe financial difficulties being experienced by Chemical. Chemical filed its Chapter XI petition on October 3, 1975. On June 21, 1977 the creditors' committee of Chemical filed a motion requesting the Court to order the debtor to file its statement of executory contracts[3] and requesting an order that all contracts relating to the ammonia

[2] The first bill requested payment on October 12, 1974 which clearly would not be 90 days after the contract was formed if October 3, 1974 is the operative date. It instead represents 90 days from the date of Kellogg's first telex. *See supra* note 1.

[3] No statement of executory contracts, as required by Bankruptcy Rule 11-11, had been filed by Chemical.

plant be deemed rejected. As grounds therefore, the committee alleged *inter alia* that it was unlikely that the contracts relating to the construction of the ammonia plant could be assumed by Chemical and the ammonia plant completed. Chemical objected to the motion on the grounds *inter alia* that the creditors' committee was not the proper party to move for a "wholesale" rejection of all executory contracts, that each contract should be examined individually to determine whether its rejection would benefit the debtor's estate, and that the Court could not order rejection of the executory contracts but could only set a date within which the debtor must assume or reject the contracts. By memorandum and order dated June 8, 1978, the Court denied the creditors' committee motion on the grounds that there was no showing that the contracts were burdensome to the estate and no showing that rejection would benefit the creditors.

At some later point in time, Petroleos Mexicanos ("Pemex"), the Mexican National Oil Company, desired to purchase the two heat exchangers. Chemical filed a complaint against K&L and Pemex seeking to enjoin the sale of the heat exchangers to Pemex. By order dated September 12, 1978, the Court denied the injunctive relief requested (with certain limitations not relevant here) and allowed the sale to proceed. In addition to the request for injunctive relief, the complaint contained an objection by Chemical to the proof of claim filed by K&L and requested *inter alia* that the Court disallow the claim.[4] The above-mentioned stipulation was entered into on June 12, 1980 by Chemical, K&L, and Chemical's creditors' committee in settlement of the dispute as to the amount of the total claim of K&L. The Court approved the stipulation on that date.

Concerned with the exchange rate issue is the creditors' committee, rather than the debtor. This is because the plan

[4] There were two proofs of claims filed by K&L to reflect that two heat exchangers were under construction. The DM 11,055.121 agreed upon by the parties reflects the total amount due K&L less the proceeds realized from the sale to Pemex.

of Chemical, confirmed on May 9, 1980, is a "pot plan" so that my decision affects the amount other creditors of Chemical will receive and does not require Chemical to supply additional money to fund the plan. In determining what date the DM 11,055,121 is to be converted into United States dollars. K&L argues that the Court should apply the "judgment day" rule, i.e., either the date on which the stipulation was approved by order of the Court or the date on which the plan of arrangement was confirmed which plan provided for the rejection of all executory contracts. On the former date, the exchange rate was 0.5679, producing an award to K&L of $6,278,203; on the latter date the exchange rate was .05529 and would produce $6,112,376. The creditors' committee contends that the "breach day" rule should apply, i.e., the date of the filing of the Chapter XI petition. The conversion rate of .3913 in effect then would produce $4,325,869. For the reasons set forth below, I am applying the judgment day rule to compute the claim of K&L. In so doing, the rate of exchange in effect on June 12, 1980, i.e., 0.5679 applies.

Discussion

Initially, it must be mentioned that neither party believes there is a conflict as to the applicable law. Both parties proceed on the assumption that the applicable law is that as set forth by the federal courts of the United States, and I have no reason to reject that choice of law.[5]

Two Supreme Court cases, *Hicks* v. *Guinness*, 269 U.S. 71 (1925) ("*Hicks*") and *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926) ("*Humphrey*") control the issue at hand. In the *Hicks* case, a German firm owed a pre-World War I debt to an American firm. The debt was payable in the United States

[5] Although I recognize that an argument can be made to the contrary, *see* Restatement (Second) Conflict of Laws §188 (1971), K&L raised this point in its memorandum and summarily dismissed it on the basis that even if the law of a different jurisdiction applies, there is no conflict. It appears K&L is correct.

although expressed in German marks. Justice Holmes stated: "[T]he debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors 'You are too late to perform what you have promised, and we want the dollars to which we have a right by the law here in force. . . .' " *Hicks, supra* at 80.

The next year, in the *Humphrey* case, the Supreme Court again addressed the issue of the proper date for conversion. In that case, an American citizen brought suit in the United States to recover money deposited in a German bank in Germany, payable in marks on demand. Justice Holmes, again writing for the Court, stated:

> A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. . . . We may assume that when the [debtor] failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law—but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. . . . [The liability] was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time. . . . An obligation in terms of the currency of a country takes the risk of currency fluctuations and *whether creditor or debtor profits by the change the law takes no account of it. Humphrey, supra* at 519 (citations omitted) (emphasis supplied).

These two cases have been reconciled by interpreting them to stand for the proposition that the judgment day rule applies where the obligation is entirely of foreign origin, i.e., where the contract calls for payment of a foreign currency in a foreign country (*Humphrey* and Restatement (Second) Conflict of Laws §144 (1971)) while the breach day rule applies where payment is to be made in the United States (*Hicks*).[6] The problem arises because an American court cannot enter judgment in any currency other than that of United States dollars. *See Frontera Transportation Co.* v. *Abaunza*, 271 F. 199 (5th Cir. 1921). This rule is so well entrenched in American law that it is not open to exceptions and requires no further citations to authorities.

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[6] There are a number of cases which appear to rely (at least in part) on this distinction. *See, e.g., Zimmerman* v. *Sutherland*, 274 U.S. 253 (1927); *Sutherland* v. *Mayer*, 271 U.S. 272 (1926); *Jamaica Nutrition Holdings, Ltd.* v. *United Shipping Co.*, 643 F.2d 376 (5th Cir. 1981); *Wyse* v. *Pioneer-Cafeteria Feeds, Ltd.*, 340 F.2d 719 (6th Cir. 1965); *Conte* v. *Flota Mercante Del Estado*, 277 F.2d 664 (2d Cir. 1960); *Reissner* v. *Rogers*, 276 F.2d 506 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960); *International Silk Guild* v. *Rogers*, 262 F.2d 219 (D.C. Cir. 1958); *The Gylfe* v. *The Trujillo*, 209 F.2d 386 (2d Cir. 1954); *Paris* v. *Central Chiclera*, 193 F.2d 960 (5th Cir. 1952); *Shaw, Savill, Albion & Co., Ltd.* v. *The Fredericksburg*, 189 F.2d 952 (2d Cir. 1951); *The West Arrow*, 80 F.2d 853 (2d Cir. 1936); *Tillman* v. *Russo Asiatic Bank*, 51 F.2d 1023 (2d Cir. 1931), *cert. denied*, 285 U.S. 539 (1932); *Brown & Williamson Tobacco Corp.* v. *The Anghyra*, 198 F.Supp. 321 (E.D. Va. 1961); *Sun Insurance Office, Ltd.* v. *Arauca Fund*, 84 F.Supp. 516 (S.D. Fla. 1948); and *Royal Insurance Co.* v. *Compania Transatlantic Espanola*, 57 F.2d 288 (E.D.N.Y. 1932). *See also* Beale, 2 Conflict of Laws §§423.1-424.2 (1935); Drake, *The Proper Rule in Fluctuating Exchanges*, 28 Mich. L. Rev. 229 (1930); Fraenkel, *Foreign Moneys in Domestic Courts*, 35 Colum. L. Rev. 360 (1935); Gluck, *The Rate of Exchange in the Law of Damages*, 22 Colum. L. Rev. 217 (1922); Rifkind, *Money as a Device for Measuring Value*, 26 Colum. L. Rev. 559 (1926); Note, *Conversion Date of Foreign Money Obligations*, 65 Colum. L. Rev. 490 (1965); Note, *The Value of Foreign Money for Purposes of Suit in the Forum and as of What Time It Should Be Ascertained*, 26 Colum. L. Rev. 209 (1926); Note, *Fluctuating Rates of Exchange and the Conflict of Laws*, 40 Harv. L. Rev. 619 (1927); Note, *The Measurement of Foreign Money Obligations*, 36 Va. L. Rev. 215 (1950); and Note, *Dollar Damage Awards to Foreign Plaintiffs*, 61 Yale L.J. 758 (1952).

Proponents of the judgment day rule have recognized its advantage of promoting uniformity no matter where suit is brought. Conversely, it has been criticized because it may tempt a party to breach a contract which calls for payment in a depreciating currency. Furthermore, damages may not be expeditiously determined by a court burdened with a heavy calendar, i.e., a long delay in bringing a case to trial conceivably could affect the amount of the judgment ultimately obtained. This is because the debt becomes the judgment only at the time the court enters judgment.

On the other hand, the breach rule is justified on the theory that foreign money is considered a commodity the value of which tends to fluctuate. Under that analogy, damages for failure to deliver the foreign currency are to be assessed as would be damages for failure to deliver any commodity contracted for, i.e., as of the date the contract was broken without regard to fluctuating exchange rates. This rule attempts to place the plaintiff in the position it would have been in had the contract been fully performed. However, it is obvious that this rule enables a plaintiff (assuming no jurisdictional problems) to shop for the most favorable forum (i.e., the forum where the value of its money has appreciated) to obtain the largest judgment. Furthermore, it potentially can work a substantial harm or provide a substantial windfall to the creditor who intends to retain the foreign currency for which it contracted (depending upon whether there has been an appreciation or depreciation in the foreign currency between the two relevant dates). Most importantly, it is recognized that the arguments stated above may be proffered by either party depending upon the circumstances of a particular case.[7]

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[7] *See Fraenkel, supra* note 6; Note, *Conversion Date Of Foreign Money Obligations, supra* note 6; Note, *The Value of Foreign Money, supra* note 6; Note, *Fluctuating Rates of Exchange, supra* note 6; Note, *The Measurement of Foreign Money Obligations, supra* note 6; and Note, *Dollar Damage Awards, supra* note 6.

In the instant case, K&L contracted with Chemical to be paid a fixed number of German marks. K&L needed a certain number of marks to pay its suppliers and employees and was expecting this number from Chemical. It is clear, by the very words of the July 25, 1974 telex, that K&L was unwilling to bear the risk of currency fluctuations. The purchase orders of Chemical acknowledged the intent of K&L by setting forth the total number of marks to be paid K&L in the United States dollars equivalent to a fixed number of German marks. A quick reading may suggest that payment was to have been made in dollars rather than marks. However, a careful reading makes it clear that the number of marks to be paid was the constant. It was only the number of dollars which was subject to fluctuation. At all times K&L expected (and bargained for) a definite number of marks. *Cf. Booth & Co.* v. *Canadian Government Merchant Marine*, 63 F.2d 240 (2d Cir. 1933). It was Chemical which could not be certain of its obligations until payment was remitted. It is unlikely that Chemical possessed the large number of German marks necessary to complete the performance called for under the contract. It would be necessary for Chemical to buy marks with the only currency it had readily available, i.e., with United States dollars.[8] K&L would always receive marks, in Germany, as a result of the exchange transaction described above.

Of course, one of the problems faced by the Court is that it is not *Chemical* who asserts the transaction was not a German transaction, but rather the *creditors* of Chemical whose pocketbooks have already been hit hard due to the filing of the Chapter XI petition, i.e., the delay in receiving a final dividend, and the compromise of their claims. It is well recognized that one of the foremost goals of bankruptcy administration is equal treatment of creditors. "[T]he theme of Bankruptcy Act is equality of distribution." *Sampsell* v. *Imperial Paper &*

[8] If Chemical wished to protect *itself* against a decline in the purchasing power of the dollar, it could have done so, e.g., by purchasing futures contracts or obtaining letters of credit.

Color Co., 313 U.S. 215, *reh'g denied*, 313 U.S. 600 (1941) and *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946) ("*Vanston*"). The chemical creditors' committee argues that to convert the claim of K&L on any date other than the date of the filing of the Chapter XI petition would fly in the face of *Vanston* wherein the Supreme Court refused to allow accrued interest to be paid on unsecured claims because of the belief that to do so would be tantamount to imposing a penalty upon the debtor's obligations due to the inherent delays of bankruptcy proceedings.

I find the relief requested in that case differs from that requested by K&L here. K&L is not seeking to obtain for itself a position better than all other similarly situated creditors; it is not seeking to penalize the debtor. Rather, it, like all other creditors, is seeking to have its claims fixed. Once fixed, it, like all other similarly situated creditors, will receive a pro rata dividend pursuant to the plan of arrangement confirmed by order of the court on May 9, 1980. It is not relevant that, if K&L converts the dollars it receives as a dividend into German marks, the percentage of marks it receives to its total claim in marks may be greater than the percentage received by American creditors who receive and *retain* United States dollars. For each creditor the Court looks to the bargained for terms of its contract. *See, e.g., United Merchants and Manufacturers, Inc.* v. *Equitable Life Assurance Society*, 674 F.2d 134 (2d Cir. 1982).

Having found the judgment day to be the applicable day for converting marks to dollars, it is left for me to determine which of the two dates proffered by K&L is the judgment day. I find the judgment day to be the date the stipulation was entered into and approved by the Court, i.e., June 12, 1980. It cannot be the date the plan was confirmed (May 9, 1980) because of §63c of the Bankruptcy Act. That section provides: "Notwithstanding any State law to the contrary, the rejection of an executory contract. . .shall constitute a breach of such

contract . . . as of the date of the filing of the [Chapter XI] petition." As set forth in 3A Collier on Bankruptcy ¶63.35 at 1956.1 (14th ed. 1975), "[t]he effect of the rejection as a breach relates back to the date of the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of the Act" (footnote omitted). "While this is a fictional relation back, it is necessary as a mechanical device." S. Rep. No. 1916, 75th Cong. 3d Sess. 6 (1938).[10] Therefore, were the Court to accept K&L's suggestion of May 9, 1980 as the judgment day, it would relate back to October 31, 1975, the date of the filing of the Chapter XI petition, i.e., the breach day and thereby defeat the argument of K&L.

I believe June 12, 1980 to be the proper judgment day. It was not until that date that the claim was fixed (albeit in German marks). Upon entering into the stipulation, the parties agreed to "fix and liquidate" the claim of K&L, i.e., the parties agreed that judgment could enter as to the claim of K&L on that date. As stated in *Humphrey* at 520, "we are lending our Courts to enforce an obligation (as we should put it, to pay damages,) arising from German law alone and ought

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[10] The proposed wording of that section was: "rejection of an executory contract as provided in this act shall constitute an anticipatory breach, in the case of an arrangement or a plan, as of the date of rejection, otherwise as of the date of bankruptcy." *See* 83 Cong. Rec. S8687 (daily ed. June 10, 1938). The Senate Committee stated it was "in accord with the objective of [the proposed] provision [but deemed] it inadvisable to make a distinction in regard to the date of the breach, between a strict bankruptcy and a debtor relief proceeding. Therefore [the] committee . . . removed this distinction and . . . related the time of the breach to the date of the filing of the petition under the act." S. Rep. No. 1916, *supra*. The case of *U.S. Metal Products Co. v. United States*, 302 F.Supp. 1263 (E.D.N.Y. 1969) cited by K&L in support of its argument that the breach day is the day the plan was confirmed, instead stands for the proposition that the filing of a Chapter XI petition, unlike a straight bankruptcy petition, does not automatically constitute an anticipatory rejection of all executory contracts. Therefore, the date of confirmation may only relate back to the breach day (the date of the filing of the petition) and may not be the judgment day.

to enforce no greater [nor lesser] obligation than exists by that law at the moment when the suit is brought." Accordingly, the DM 11,055.121 are to be converted into United States dollars at the exchange rate prevailing on June 12, 1980.

SO ORDERED.

At Worcester, this 22nd day of July, 1983.

(s) PAUL W. GLENNON
PAUL W. GLENNON
U.S. Bankruptcy Judge

FILED IN THE CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT
Dec 14 11:49 AM '84

United States Court of Appeals
For the First Circuit

No. 84-1208

IN RE:
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION,
CREDITORS' COMMITTEE,
APPELLANT.

Before
CAMPBELL, *Chief Judge*,
STEWART,* *Associate Justice (Retired)*,
and BOWNES, *Circuit Judge*.

ORDER OF COURT
ENTERED: DECEMBER 14, 1984

Upon consideration of appellant's petition for rehearing,
It is ordered that said petition be, and the same hereby is, denied.

By the Court:
(s) FRANCIS P. SCIGLIANO
Clerk.

[cc: Ms. LaFleur and Mr. Swain.]

* Of the Supreme Court of the United States, sitting by designation.

United States Court of Appeals
For the First Circuit

No. 84-1208

IN RE:
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION,
CREDITORS' COMMITTEE,
APPELLANT.

JUDGMENT
ENTERED: NOVEMBER 7, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated and the cause is remanded to the district court for revaluation of K&L's claim in accordance with the exchange rate in effect on May 9, 1980, in accordance with the opinion filed this date.

By the Court:
(s) FRANCIS P. SCIGLIANO
Clerk.

[cc: Mr. Swaim and Ms. LaFleur.]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

No. 75-2742-G

IN RE
GOOD HOPE CHEMICAL CORP.,
DEBTOR.

IN PROCEEDINGS FOR AN ARRANGEMENT
UNDER CHAPTER XI

ORDER AND JUDGMENT

Pursuant to Bankruptcy Rule 921(a), and in accordance with this Court's Memorandum and order Re: Exchange Rate Issue dated July 22, 1982 and with paragraph 1 of the Stipulation as to Admitted Facts and as to Admissibility of Certain Evidence dated January 20, 1983, it is hereby ORDERED, ADJUDGED, AND DECREED:

THE CLAIM OF KOERVER & LERSCH IS ALLOWED AS A GENERAL UNSECURED CLAIM IN THE AMOUNT OF $6,278,203 (DM 11,055,121 TIMES 0.5679, THE EXCHANGE RATE PREVAILING ON JUNE 12, 1980).

AT WORCESTER, THIS 28TH DAY OF JULY, 1983.

(s) PAUL W. GLENNON
PAUL W. GLENNON
U.S. Bankruptcy Judge

Office - Supreme Court, U.S.
FILED
APR 12 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1498

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN RE
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION
CREDITORS' COMMITTEE,
PETITIONER,

v.

KOERVER & LERSCH,
RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

GEORGE MARSHALL MORIARTY
(Counsel of Record)
CHARLES P. NORMANDIN
CHERYL A. LAFLEUR
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Counsel for Respondent, Koerver & Lersch

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Question Presented

Should this Court review the decision of the Court of Appeals that Section 63c of the now repealed Bankruptcy Act (11 U.S.C. 103(c)) does not affect the date for converting a particular creditor's claim in this Chapter XI proceeding from foreign currency to dollars?

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1498

IN RE
GOOD HOPE CHEMICAL CORPORATION,
DEBTOR,

GOOD HOPE CHEMICAL CORPORATION
CREDITORS' COMMITTEE,
PETITIONER,

v.

KOERVER & LERSCH,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent Koerver & Lersch submits this brief in opposition to the petition of the Good Hope Chemical Corporation Creditors' Committee (the "Committee") for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case

Koerver & Lersch is a West German manufacturing concern[1] whose claim in the Chapter XI proceeding of Good Hope Chemical Corporation ("Chemical") is the subject of this case. The issue before the United States Court of Appeals for the First Circuit was the proper exchange rate to be used in converting the allowed claim of Koerver & Lersch from West German marks to United States dollars. The Court of Appeals, applying the "breach day rule" of *Hicks* v. *Guinness*, 269 U.S. 71 (1925), held that the exchange rate to be used was that in effect on May 9, 1980, the date on which Chemical's contract with Koerver & Lersch was rejected by confirmation of Chemical's Plan of Arrangement. *See* Opinion of the Court of Appeals, *reprinted in* Appendix to the Committee's Petition for Certiorari, at A-14. The Plan of Arrangement specified that Chemical's executory contracts would be rejected effective as of confirmation. (A-12 n. 7).

The Court of Appeals rejected the Committee's contention that now repealed Section 63c of the Bankruptcy Act of 1898, 11 U.S.C. §103(c) (1976)[2] (hereinafter "Section 63c"), required that the date of breach relate back to October 31, 1975, the date on which Chemical filed its Chapter XI petition. (A-12-14). The Court of Appeals held that the rationale of the "relation back" rule of Section 63c "has no applicability to the conversion rate issue." (A-13-14). The Committee now asks this Court to review the applicability of Section 63c to the facts of Koerver & Lersch's claim.

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[1] Koerver & Lersch is not a corporation.

[2] The Bankruptcy Act of 1898 was repealed by Bankruptcy Reform Act of 1978, which enacted the Bankruptcy Code. Pub. L. No. 95-598, § 401, 92 Stat. 2549, 2682 (1978). The Bankruptcy Act of 1898, however, continues to govern all cases commenced thereunder, which "shall be conducted and determined under such Act as if [the Code] had not been enacted." Pub. L. No. 95-598, § 403(a), 92 Stat. 2549, 2683 (1978). The instant case, which was commenced in 1975, is governed by the Bankruptcy Act.

Reasons for Denying the Writ

I. The Committee's Petition Presents No Question of Federal Law Which Requires Resolution by This Court.

The only issue presented for review in the Committee's petition is the Court of Appeals' decision that a particular section of the Bankruptcy Act was inapplicable to the calculation of Koerver & Lersch's claim in this proceeding. In reaching this decision, the Court of Appeals relied on the factual background of Chemical's Chapter XI proceeding, noting that "[h]ere the breach was complete, and the compensable loss incurred, only when the contract was rejected on May 9, 1980, not before." (A-13). The Court of Appeals made no ruling as to the applicability or interpretation of Section 63c in any other context. Nor does the Committee suggest any universality to the underlying fact pattern, so as to commend this case to this Court's attention. Indeed, the Committee has cited no other case raising the exchange rate issue in the context of a Chapter XI proceeding, nor is respondent aware of any.

In any event, Section 63c itself has since been repealed. The Bankruptcy Reform Act of 1978, which repealed the Bankruptcy Act and replaced it with the new Bankruptcy Code, *see* note 2, *supra*, does not carry forward the wording of Section 63c which was before the Court of Appeals in this case. While certain provisions of the Bankruptcy Code may be similar to Section 63c, *see* Petition at 7, those provisions differ in language and legislative history and were not addressed by the Court of Appeals herein.

II. There Is No Conflict Between the Decision of the Court of Appeals in This Case and Any Decision of Any Other Court of Appeals or of This Court.

The basis of the Committee's petition is a claimed conflict between the decision of the Court of Appeals for the First Circuit in this case and the decisions of other federal courts. However, examination of the cases relied upon by the Committee readily reveals that no such conflict exists.

A. *The Court of Appeals' Interpretation of Section 63c Does Not Conflict With* Workman *or* Bildisco.

The Committee suggests that the First Circuit's interpretation of Section 63c somehow conflicts with the decision of the Tenth Circuit in *Workman* v. *Harrison*, 282 F.2d 693 (10th Cir. 1960), and with the decision of this Court in *NLRB* v. *Bildisco and Bildisco*, 104 S.Ct. 1188 (1984). However, those cases in no way conflict with the Court of Appeals' decision; in fact, they are simply not pertinent to the issue in this case.

In *Workman* v. *Harrison*, 282 F.2d 693 (10th Cir. 1960), the Tenth Circuit was called upon to determine the rights of a shopping center promoter against the bankruptcy estate of a corporate financier who had orally agreed with the promoter to provide financing in exchange for certain services. The court found that the oral agreement was a valid contract whose rejection by the trustee in bankruptcy constituted a breach and entitled the promoter to assert a claim against the estate. *Id.* at 699. However, the court rejected the promoter's claim to the land on which the shopping center was to have been built, holding that under Section 63c the promoter's claim was instead limited to the value of his contract at the time of the filing of the bankruptcy petition. *Id.* at 699.

NLRB v. *Bildisco and Bildisco*, 104 S.Ct. 1188 (1984), did not involve Section 63c at all. There this Court considered the issues of whether a collective bargaining agreement was an

executory contract subject to rejection in a case under Chapter 11 of the new Bankruptcy Code, and whether such a rejection constituted an unfair labor practice under the National Labor Relations Act. The Court ruled that a collective bargaining agreement was an executory contract which could be rejected by a debtor in possession, and that the rejection would relate back to the date immediately preceding the date of filing. *See id.* at 1198-99.

In both *Workman* and *Bildisco*, the "relation back" issue was peripheral and did not directly bear on the primary questions presented. Neither case poses any conflict with the decision of the Court of Appeals herein, which found the "relation back" rationale irrelevant to the factual circumstances and legal issue before it. (A-12-14).

B. *The Decision of the Court of Appeals Correctly Interprets, and Does Not Conflict With,* Hicks *v.* Guinness.

Nor does the Court of Appeals' decision, as the Committee would suggest, conflict with the decision of this Court in *Hicks* v. *Guinness*, 269 U.S. 71 (1925). In that case, this Court considered the conversion of damages from foreign currency to dollars in a breach of contract case.[3] The Court held that a

[3] The Court of Appeals chose the so-called "breach day rule" of *Hicks* v. *Guinness* over the "judgment day rule" of *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517 (1926), because Koerver & Lersch's claim against Chemical arose under American law. (A-6-12). However, the Court of Appeals' decision that the controlling exchange rate is that in effect on May 9, 1980, is correct under either rule: May 9, 1980, the date of confirmation of the Plan of Arrangement, which the Court of Appeals correctly recognized as the date of breach, can also be viewed as the date of judgment. *See Miller* v. *Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (confirmation of plan of arrangement by bankruptcy court "has the effect of a judgment rendered by a district court"). The Plan of Arrangement provided that executory contracts would be rejected effective as of confirmation. (A-12 n. 7). This and other provisions of the Plan of Arrangement, upon confirmation, became binding upon all creditors of Chemical, as well as upon Chemical itself. *See* Bankruptcy Act of 1898, § 367(1), 11 U.S.C. § 767(1) (1976).

claim of an American creditor against a German debtor should be converted from marks to dollars as of the date of breach, the date "upon which . . . liability becomes absolute as fixed by law." *Id.* at 80.

The Court of Appeals in the instant case correctly applied the *Hicks* decision to the factual circumstances of Chemical's Chapter XI proceeding. As the Court of Appeals noted, Chemical refused to reject its contract with Koerver & Lersch, and to relieve Koerver & Lersch of its obligations thereunder, until May 9, 1980, the date on which the contract was rejected upon confirmation of Chemical's Plan of Arrangement. (A-3-4, 13). Thus, the first date on which Chemical had an enforceable obligation to Koerver & Lersch was May 9, 1980. Therefore, the Court of Appeals ruled that, under *Hicks* v. *Guinness*, the date as of which Koerver & Lersch's claim should be converted from marks to dollars was May 9, 1980. (A-12-14). Section 63c of the Bankruptcy Act did not affect this conclusion, since a "fictional" relation back of the breach date by operation of Section 63c did not give rise to any enforceable obligation before May 9, 1980. (A-12-13). This analysis is wholly consistent with the principles articulated by this Court in *Hicks* v. *Guinness*.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE MARSHALL MORIARTY
(Counsel of Record)
CHARLES P. NORMANDIN
CHERYL A. LAFLEUR
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Counsel for Respondent, Koerver & Lersch

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